United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

1-31-77

76-7590

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7590

SEYMOUR LANDAU, and all others similarly situated,

Plaintiff,

-against-

THE CHASE MANHATTAN BANK, N.A.,

Defendant.

ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SEYMOUR LANDAU, and all others similarly situated,

Plaintiff-Appellant, : Docket No. 76-7590

-against-

THE CHASE MANHATTAN BANK, N.A.

Defendant-Appellee.

- -x

ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

Plaintiff-Appellant appeals from the following orders of Hon. Kevin T. Duffy, U.S.D.J.: (i) memo endorsed, entered June 18, 1976, denying plaintiff's motion to compel the defendant (the "Bank") to answer interrogatories and produce documents relating to legal fees incurred in defense of the action; (ii) order entered November 5, 1976 awarding counsel fees to his attorney in the amount of $12,500.00.

ISSUES PRESENTED FOR REVIEW

1. Whether it was error for the District Court to award counsel fees in a class action without following proper standards?

2. Whether it was error for the District Court to award counsel fees without articulating findings of fact and conclusions of law, nor holding an evidentiary hearing?

3. Whether it was error for the District Court to deny plaintiff's motion to compel discovery of legal fees paid by the Bank in the unsuccessful defense of this action?

Statement of the Case

A. Nature of the Case.

The within proceeding is a class action on behalf of the named plaintiff and all others similarly situated, consisting of checking account customers of the Bank, who had entered into cash reserve credit agreements with the Bank, entitling them to overdraw on their checking accounts up to certain designated limits.

The complaint asserted the illegality of two practices followed by the Bank in connection with the

computation of finance charges on such cash reserve checking accounts, viz., (i) exacting finance charges on check service charges of 10¢ per check and monthly maintenance charges of 75¢ in addition to the principal amounts of the overdrafts; and (ii) compounding of finance charges., i.e., charging interest on interest.

The two practices were alleged to have violated the National Bank Act (12 U.S.C. Secs. 85 and 86) and New York Banking Law, Sec. 108(5). Based on these violations, plaintiff sought declaratory, injunctive and monetary relief. The Bank denied the material allegations of the complaint and asserted three affirmative defenses.

B. Proceedings Below.

1. Class Action

Plaintiff's motion for class action certification, pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure, was granted by decision of September 28, 1973. (A6-22*) This decision was

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* "A" refers to the Joint Appendix. Page numbers appear on the lower right hand corner of each page.

reported at 367 F.S. 992. The class was comprised of all persons who had cash reserve special checking accounts with the Bank at any time from October 25, 1970 to September 28, 1973, against whom interest charges were imposed on special checking account service and maintenance charges. (A-34).

By order of November 7, 1973, (Doc. 25, IRA)* the Bank was directed to give notice to each and every class member by first class mail, in accordance with Rule 23(c)(2), and in the form appended to said order. The bank, in an affidavit of December 28, 1973, stated that 65,894 notices were mailed to class members. (Doc. 26, IRA)

2. Summary Judgment

With respect to the merits, each of the parties moved for summary judgment. By the aforesaid opinion dated September 28, 1973, the District Court decided such applications. The Court found illegal the Bank's practice of imposing interest charges on check service charges and maintenance charges, in addition to the principal amount of an overdraft. It dismissed, however, for lack of standing, that portion of

* IRA refers to Index to Record on Appeal

the plaintiff's claim which was based upon the compounding practice, on the rationale that the named class representative had not had such practice imposed against him.

By Order of November 7, 1973, (Doc. 25, IRA) based on the said September 28, 1973 decision, the Bank was enjoined and restrained from continuing to compute interest charges in the manner deemed illegal or from collecting any interest charges so computed. The Bank was further ordered to pay to the class representative and each member of the class a sum equal to the total interest charges paid by each of them on check service charges from October 25, 1970 to September 28, 1973.

By Order of June 19, 1974, (A33-37), the November 7, 1973 Order was amended to have the injunction embrace monthly maintenance charges, as well as check service charges (A35), upon motion made by the plaintiff.

3. Settlement.

Thereafter, various applications were made by the parties relating to assessment of monetary damages, including the cost, method of computing and measure of damages, as well as related matters. These issues were explored via motions,

conferences and pre-trial hearings.

By Order dated December 4, 1975 (A-38) the action was referred to a Magistrate for the purpose of conducting an inquest on the question of damages, which were to be computed exactly with reference to the monthly statements of each member of the class.

During the course of the hearings before the Magistrate, the parties arrived at a settlement which they deemed fair and reasonable. This settlement was embodied in a stipulation, dated April 19, 1976. (A-43-49). The essential terms of the settlement were as follows:

(a) a 35¢ credit to approximately 72,000 class members, without any deduction whatsoever, for costs in the litigation.

(b) a permanent injunction against use of the illegal method of computing finance charges.

(c) a continued voluntary discontinuance of the challenged compounding practice, dismissed for lack of standing of the named plaintiff, which practice had been discontinued since in or about October, 1973.

(d) counsel fees payable by the Bank "in such amount as shall be allowed by the Court." (A-47)

On June 2, 1976 a hearing was held before the District Court as to the propriety of the settlement and with respect to the proposed fee application of counsel to be thereafter made in the approximate amount of $135,000.00. Plaintiff submitted a memorandum in support thereof. (A-52-65) No objectants appeared at said hearing, although due notice of the hearing had been given to them (A-66-68). A judgment of even date approving the settlement, as fair, reasonable and adequate, was entered by the Court on June 3, 1976. (A-80-81) The Court retained jurisdiction over the consummation of the settlement and the award to plaintiff and his counsel of attorney's fees.

4. Legal Fees.

Thereafter, a demand for answers to interrogatories and for production of certain documents was served upon the Bank by the plaintiff, as to the legal fees incurred by the Bank. The Bank objected to furnishing the requested information and documents. Plaintiff, therefore, moved to compel answers thereto. (A-75-79) This motion was summarily denied. (A-116)

After the denial of the above application, plaintiff moved (A-85-115) for an order setting legal fees for his counsel. By opinion dated November 3, 1976, the Court granted plaintiff's application to the extent of awarding the sum of $12,500.00. (A-119)

Plaintiff thereafter appealed from the counsel fee award and the denial of his motion to compel discovery with respect to the legal fees of the Bank (A-120)

C. Statement of Facts

Plaintiff sought discovery of the legal fees incurred by the Bank (A-39-41). The Bank objected to providing the answers to interrogatories Nos. 1, 2 and 4 and the furnishing of the relevant documents, on the grounds that (i) the attorney-client privilege was applicable; and (ii) the requests were not relevant to any issue in the action or reasonably calculated to lead to the discovery of admissible evidence (A-69,71)

On June 17, 1976, oral argument was had on the motion to compel discovery. The Court denied the motion at the conclusion of the oral argument, in a memorandum endorsed (A-116), on the notice of motion, as follows:

"Motion denied.
So Ordered."

Subsequent to the denial of the discovery of the Bank's legal fees, plaintiff moved for an order awarding legal fees to his counsel (A-85-115) payable by the Bank, in accordance with para. 2(b) of the stipulation of settlement (A-47), which provided that the fee would be "in such amount as shall be allowed by the Court."

1. Time Spent

The foregoing application included an affidavit by counsel to the plaintiff setting forth at length the time expended in prosecuting this litigation, the nature of the legal services rendered and the applicable time periods. A schedule of legal services annexed to the affidavit (A-104-108) enumerated such details as to fifty-two (52) separate items of services rendered, comprising a total of 482.25 hours.

A summary of these services and the time spent thereon, was also furnished to the Court below (A-96), as follows:

Nature of Services		Hours Spent
(a)	Pre-Complaint and Pleadings	49.5
(b)	Discovery	29.75
(c)	Class Action Motion	47.5

Nature of Services		Hours Spent
(d)	Summary Judgment Motion	45.5
(e)	Motions to Amend and for Reargument	51
(f)	Court Appearances (not including motions)	62.25
(g)	Settlement	50.5
(h)	General	66
(i)	Legal Fee Application	38.5
(j)	Miscellaneous	45.25
	Total Time Spent.	482.25

2. Typical Hourly Rate and Lodestar Fee

The said fee application requested that an hourly fee of $150.00 be applied to the 482.25 hours of legal services rendered by counsel on behalf of the class. (A-96-98) The "lodestar" fee for such services, on a quantum meruit basis, was $72,337.50 (A-98)

3. Risk of Litigation and Subjective Factors

The subjective factors to be considered in the appropriate adjustment to augment the lodestar fee, relating to the "risk of litigation" factor, the standing at the Bar of counsel for the parties and the economic benefits conferred upon the class, were concurrently presented to the Court. (A-98-102); (A-109-115).

The affidavit of a Certified Public Accountant (A-109-115) revealed that the economic benefits conferred upon the class, or to be reasonably expected in the future, was in the total sum of $425,604.50. These benefits were enumerated, together with relevant schedules, as follows:

a.	cash benefits	$25,200.00
b.	pre-judgment benefits 10/73 to 6/76	46,970.00
c.	post-judgment benefits 7/76 to 6/86	209,822.00*
d.	legal fee payable by defendant	132,112.50
e.	estimated notice costs	11,500.00
Total benefits.		$425,604.50

The legal fee of $132,112.50 requested represented approximately 32% of the total economic benefits conferred upon the class. (A-110) The requested fee was arrived at by applying a multiple of two (2) to the lodestar rate, except for the services attributable to the legal fee application (38.5 hours) and certain miscellaneous items (45.25 hours), for which only the quantum meruit lodestar rate was requested. (A-102)

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* The actual total benefit was $343,972.00. The above benefits represent the present value of the actual total benefit, by applying a factor of .61.

No evidentiary hearing was ordered by the District Court, nor did the Bank present any evidence controverting the affidavit of plaintiff's counsel as to the services rendered. The Court awarded the sum of $12,500.00 as counsel fees (A-119)

Summary of Argument

Appellant seeks reversal and remand with respect to the award of counsel fees on the grounds that the Court below abused its discretion in that it did not properly consider the standards previously enunciated by this Court in the landmark case of City of Detroit v. Grinnell, 495 F. 2d 448 (2d Cir. 1974). as well as other relevant authorities.

The court below grounded its decision on the fatally discredited "equitable fund" theory, which even if, arguendo, applicable, is irrelevant to a fee contractually agreed to be paid "in such amount as shall be allowed by the Court." (A-47) The niggardly fee awarded, limited to some arbitrary proportion of the "fund" created, does not provide the "just compensation" called for by Grinnell,(at p. 470) nor promote the traditional policy of providing "a motive to private counsel to represent consumers and to enforce the laws." (1 B Moore, Fed. Prac., Sec. 1.47)

It is the contention of appellant that the minimum,

or lodestar, fee, in class actions, is mandated by Grinnell, to be the time spent multiplied by the typical hourly rate for an attorney rendering like legal services on a non-contingent basis, i.e., quantum meruit compensation.

Subsequent to the calculation of this objective minimum fee, a multiple has traditionally been applied equal to between twice and quadruple the minimum fee, to reflect foremost the "risk of litigation" factor, viz., "despite the most vigorous and competent of efforts, success is never guaranteed." (p. 471) This is particularly so where the action was not preceded by prior governmental action, and represented a novel theory of law, as the within action.

On a public policy level, Grinnell, was concerned that the legal profession not be held in disrepute in connection with the award of legal fees in class actions. Here, a quantum meruit fee is sought, together with an upward adjustment to reflect the "risk of litigation" factor. This fee is payable, by agreement, solely by the adjudicated wrongdoer, and without any deduction of any kind from the economic benefit or "fund" created on behalf of the class.

To affirm the court below would create a precedent

whereby attorneys for the wrongdoer may be compensated on a totally unaccounted for, secretive basis, whereas counsel for the aggrieved small claimants would be limited to an obviously small proportion thereof. Such disparity in fee compensation would sound the death knell for the use of the judicial forum by consumers and others with small individual claims.

The real question at issue is realistic access to the courts for small claimants. This issue presents questions of constitutional dimensions, as there would be a chilling effect on enforcement of federal laws, if just compensation, for counsel fees, were not awarded.

Concomitantly, niggardly fees for the less advantaged, as opposed to generous fees to counsel for wrongdoers, would be in total disharmony with the rationale of Grinnell, to wit, that the legal profession not be held in disrepute.

With respect to the discovery of legal fees of the Bank sought by the appellant, the Court below summarily denied appellant's application, without providing any rationale whatsoever, although the attorney-client privilege does not embrace the retainer agreements or legal fees incurred by litigants. (Point II). Moreover, in a class action context, the legal

fees of counsel for the defendant is particularly relevant as a yardstick by which the hours spent and the hourly fees sought by counsel for the class representative can be measured.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN NOT FOLLOWING THE PROPER STANDARDS FOR ESTABLISHMENT OF LEGAL FEES IN CLASS ACTIONS AND SHOULD BE REVERSED

The primary decideratum of the court below, in its succinct decision (A 119), was the approximately $25,200.00 benefit derived by a credit of 35¢ to each of the approximately 72,000 checking accounts of class members. This element of benefit to the class was explicitly called to the court's attention by both parties.

Apparently, this credit was considered the sole economic benefit from which the legal fee award could be made. Such approach was in accord with the "equitable fund" approach set forth in the April 27, 1976 letter to the court from counsel for the Bank (A-50-51), propounding such measure of legal fee recovery.

The use of the "fund" theory, was also in accord with the previous decision of the Court of June 14, 1974 (A 30) denying legal fees under the private Attorney-General theory for the declaratory and injunctive relief obtained on behalf of the class, as a result of the September 28, 1973 decision of the Court (A 6-22). This rigid adherence to the "fund" theory was, perhaps, understandable, as Grinnell had only been decided three months earlier, in March 1974.

Significantly, the court recognized that the injunctive relief obtained "obviously benefits the class even though damages have not yet been assessed." (A-30) It is also worthy of note that at the time such previous application was made on a private Attorney-General basis, the prevailing practice was to award fees on such basis. It was not until nearly one year later, in Alyeska Pipe Line Service Co. v. Wilderness Society, 421 U.S.240 (May 12, 1975), that this theory was foreclosed.

Even if, arguendo, the "fund" theory were applicable, the Court below did not apply it properly. It wholly ignored the substantial economic benefits conferred upon the class by the injunction obtained in November, 1973, which has resulted in premanently restraining the Bank's use of the illegal practice. Nor has the Court below considered the

benefits derived by the discontinuance of the challenged compounding practice since November, 1973, although such economic benefit is explicitly recognized in the stipulation of settlement. (A 45)

The economic benefits obtained by the class were set forth in the affidavit of the Certified Public Accountant evaluating such economic benefits.(A 109-115) The total benefit conferred was not $25,200.00, but $425,604.50. The legal fee requested represented 32% of this total benefit. The Bank offered no evidence refuting such evaluation, nor did the Court express any reason for its rejection of this evidence.

Similarly ignored was the 482.25 hours detailed in counsel's legal fee application, as well as the typical hourly fee and risk of litigation factors therein set forth. The court held no evidentiary hearing, received no contradictory evidentiary material from the Bank, nor articulated any findings of fact with respect to each of these elements.

Rather, it addressed these elements in the following conclusory manner:

> "In light of all the circumstances, including time expended by the attorneys, the amount awarded is generous." (A 119)

Most crucially, the court below did not follow the proper standards established in Grinnell, as discussed below.

A. Proper Standards

Until the decision of City of Detroit v. Grinnell, 495 F. 2d 448 (2d Cir. 1974), the standard measure of recovery in class actions was a range of from 20% to 40% of the fund created. Epstein v. Weiss, C.C.H. Fed. Sec. Law Rep. para. 92,938 (E.D.L.A. 1970); Rosenfeld v. Black, 56 F.R.D. 604 (S.D.N.Y. 1972).

Even if no monetary fund were created, however, if economic benefits were conferred upon class members, a legal fee would be awarded to plaintiff's counsel to encourage the institution of litigation for grievances of small claimants. Mills v. Electric Auto-Lite, 396 U.S. 375, 396 (1970); Hall v. Cole, 412 U.S. 1 (1973).

1. Standards of Second Circuit

The Grinnell decision established new guidelines for the establishment of legal fees in class actions. The criteria enunciated in Grinnell, created a minimum fee which was to be ascertained by determining certain objective

factors, to wit, the time spent on the services rendered and the hourly rate which attorneys of like skill would receive, i.e., a quantum meruit compensation.

Thus, Grinnell requires as a "starting point in every fee award...a calculation of the attorney's services in terms of the time he has expended on the case." (p. 470) "Once the District Court ascertains the number of hours.... it must attempt to value the time." (p. 471) It is then further pointed out by this Court that:

> "No one expects a lawyer to give his services a t bargain rates in a civil matter...No one expects a lawyer whose compensation is contingent upon a success to chage, when successful, as little as he would charge a client who in advance had agreed to pay for services, regardless of success." (p. 470)

After this basic minimum, lodestar, fee, is arrived at, other more subjective factors would be considered which would take into account the contingent nature of the class action procedure. As stated by the Court, "Perhaps, the foremost of these factors is the attorney's 'risk of litigation' i.e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed." (p. 471)

To determine the "risk of litigation" factor,

the Court suggested that three questions be asked. Firstly, whether there has been relevant government action preceding the class action; secondly, whether other related actions have been commenced; and lastly, whether the issues are "novel and complex or straight forward and well-worn."

The fee application herein has scrupulously followed the principles set down in Grinnell and has meticulously provided to the Court the information necessary to evaluate each of the Grinnell elements. Counsel for the appellant has detailed the expenditure of 482.25 hours in the successful prosecution of this vigorously defended litigation. The Court below made no finding of fact whatsoever as to the number of hours asserted to have been rendered by counsel. Furthermore, the Bank did not present any evidentiary material to the Court below contradicting the amounts of hours spent. A blunderbuss memorandum of law was submitted by the Bank, however, making wholly speculative assertions as to the time spent.

With respect to the hourly fee of $150.00 requested, the Court below did not make any findings of fact as to the "the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of

compensation." (Grinnell, at p. 471)

Indeed, even the Bank suggested to the Court below that a $75.00 per hour rate be utilized for the "initial Grinnell computation" (Br., p. 13) (Doc. No. 51, IRA) The Bank furnished no evidence, however, as to the fees received by its counsel on an hourly basis, nor the amount of hours expended in the unsuccessful defense of this litigation. It is submitted, however, that judicial notice may be taken that the hourly rate for a senior attorney with counsel for the Bank would be in the $150.00 per hour range. The Court below, however, awarded plaintiff's counsel only the sum of $26.00 per hour.*

As set forth above, the District Court failed to properly consider each and every standard required under Grinnell. Thus, neither time nor hourly rate, was considered, to arrive at the quantum meruit compensation, called for as a minimum fee. Nor did the Court consider the other subjective factors, foremost of which is the "risk of litigation" factor, although all three elements in determining such "risk", as set forth in Grinnell, are met herein. Specifically, there has been no governmental litigation which plaintiff has rode the coattails of, nor has there been other private litigation

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* $12,500.00 ÷ 482.25 hours = $26.00 per hour

which would be supportive of plaintiff's challenge to the illegal practice. Lastly, the question involved is a "novel" one, which would not have been redressed except for this action.

2. Prevailing Basis for Setting Legal Fees

This Court in Grinnell, noted with approval, (495 F.2d at 473), the guidelines for establishing fees, established in Lindy Bros. Builders Inc. v. American Radiator, 487 F. 2d 161 (3rd Cir. 1973), commonly known as Lindy I.

As Grinnell, Lindy I required that quantum meruit compensation be first determined by ascertaining the time spent and the hourly rate to be applied to such time. Other subjective factors, were then to be reviewed, for the purpose of adjusting the minimum fee, which it referred to as the "lodestar" fee. This principle of establishing fees was reaffirmed in a second appellate review of Lindy,(540 F. 2d 102 (3rd Cir. 1976), commonly known as Lindy II.

The recent case of Pitchford v. Pepi Inc., 531 F. 2d 92, 110 (3rd Cir. 1976), likewise applied these principles, and expressly rejected an arbitrary limitation of the fee to a percentage of a fund created, in the following language:

> "The focus of the court's attention is to be the objective standards provided by the hours expended by counsel and the reasonable hourly rate of compensation for each attorney involved."

The rejection of the setting of an arbitrary fee based on some percentage of a "fund" created, rather than quantum meruit compensation, has been enunciated in many cases. E.g., Eovaldi v. First National Bank of Chicago, C.C.H. Cons. Cred. Guide, para. 98, 419 (E.D.Ill. 1976); Merola v. Atlantic Richfield Co., 493 F.2d 292 (3rd Cir. 1974) (Merola I), 515 F. 2d 165 (Merola II.)

Merola I and Merola II presented a fee-setting atmosphere remarkably similar to the within proceeding. In that action a settlement was made by which certain practices of the defendant were discontinued voluntarily, prior to adjudication, because of alleged antitrust violations. As part of the settlement the defendant agreed orally to pay such legal fee as determined by the Court. No monetary "fund" was created.

Counsel for the class requested a legal fee of $250,000.00 based upon 871 hours expended on the litigation. The Court made a specific finding that the compensable time spent on the litigation was 264.2 hours. Based on this

finding, and its view that there was no economic benefit to the class, the District Court in that case awarded a legal fee of $5,000.00, plus certain expenses.

This award was reversed by the Third Circuit in Merola I. The court reasoned as follows:

> "However, it is well recognized that counsel fees may be awarded whenever the parties have entered into an enforceable agreement providing for same." (p. 297)
>
> * * *
>
> "We see no reason why the Lindy standards need be confined to situations in which benefit analysis (as distinguished from an agreement to pay attorney's fees) supplies the quasi-jurisdictional predicate." (p. 298)

On remand, the District Court reaffirmed its $5,000.00 award. Its rationale that "the pecuniary and non-pecuniary benefit bestowed upon the class to be far less than the amount sought by counsel and concluded that only in an unfettered outburst of unwarranted generosity could a value in excess of $5,000.00 be placed upon the value of the attorney's services," was rejected in Merola II, at p. 168.

The Third Circuit once again remanded and directed the Court below as follows

> "Therefore, in the exercise of our power to set a minimum fee /citations/, we deem it appropriate to indicate that we will expect the District Court to award a fee in this case not less than the objective value of the legal services..." (Merola II, at p. 173)

On the second remand, an award was approved by the Court (May 30, 1975, Teitelbaum, J., Case No. 71-1020) in an amount equal to $100.00 per hour for the senior attorney representing plaintiff, and a lower rate for associates. These hourly factors were applied to the total of 264.2 hours found to have been expended on the litigation. To this objective standard was applied a multiple of 2.1, to reflect the contingency and other subjective factors, outlined by the appellate court.

The within action presents an even stronger set of circumstances for reversing the court below. Here, the District Court made no finding whatsoever as to the 482.25 hours detailed in the affidavit for legal fees submitted below. Moreover, plaintiff in Merola, did not even submit a detailed affidavit enumerating the services rendered and the time spent on each element of service.

Other substantial differences between Merola and this action include:

(a) a written agreement to pay the legal fee is involved here (A 47), as opposed to the oral agreement in Merola;

(b) a fund of $25,200.00 was created here. No fund whatsoever was created in Merola.

(c) this litigation was the subject of a vigorous defense by the Bank, whereas Merola was settled at its inception, and prior to any adjudication.

B. Failure to Consider Standards is Reversible

This Court in Grinnell, supra, and uniformly in other federal jurisdictions throughout the country, have held that it is an abuse of discretion for the trial court to employ improper standards in establishing legal fees, nor to hold evidentiary hearings where factual circumstances are at issue.

Grinnell, supra, at p. 473-474;

Merola I, supra, at p. 295;

Merola II, supra, at p. 168;

Lindy I, supra, at p. 166;

Lindy II, supra, at p.116;

Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 717 (5th Cir. 1974);

Miller v. Mackey International, 515 F. 2d 241, 242 (5th Cir. 1975);

Kerr v. SAG, 526 F. 2d 67,70 (9th Cir. 1976).

C. Typical Fee Awards

A review of class action litigation in the civil rights, public interest, securities, antitrust and usury, areas, reveals that the "lodestar" determination based upon quantum meruit, as a minimum basic fee and an adjustment of such fee based on the risk of litigation factor, is the proper basis for setting fees in a class action context, whether a common fund is involved, whether declaratory and injunctive relief only is obtained, or even where the class members could not even conceivably benefit by the proceeding.

Thus, in Ratner v. Chemical Bank, 54 F.R.D. 412 (SDNY 1972), a $20,000.00 legal fee was awarded to counsel for plaintiff for recovering $100.00 for their client. That case involved a class action claim under the Truth-in-Lending Act. The class action claim was denied (329 F.S. 270) and only the individual claim remained. Even this individual claim involved a hypertechnical violation which only took place during a one month period and could not even be the basis for injunctive relief. This amount was awarded although plaintiff was represented by the NAACP Legal and Educational Defense Fund, Inc., whose attorneys were not working on a contingent basis.

In recent antitrust litigation, Arenson v. Board of Trade, 372 F.S. 1349, (N.D. Ill. 1974), legal fees in excess of $1,000,000.00 were awarded to plaintiff's counsel, although only injunctive relief was obtained and no monetary fund whatsoever was created. The Court determined the "lodestar" minimum fee and applied a multiple of four (4) to arrive at the compensation of counsel. This approach permitted the award of counsel fees as high as $500.00 per hour. (p. 1359)

Other antitrust cases where substantial hourly rates were awarded based on a multiple of the "lodestar" value, include:

In Re Gypsum Cases,
386 F.S. 954 (N.D. Cal. 1974);
(lead counsel $300.00 per hour)

Oppenlander v. Standard Oil Co.,
64 F.R.D. 597, 613 (N.D. Cal. 1974)
($190.00 per hour)

Doughboy Industries v. American Cyanimid,
1975 - 2 Trade Cases para. 60,452 (D. Minn. 1975
(lead counsel $300.00 per hour)
(Para-legal time was at the rate of $20.00 per hour, to which a multiple of 2½ times was applied, resulting in fees of $50.00 per hour for non-attorneys.)

In Grinnell, on remand, the District Court awarded fees of from $300.00 to $375.00 per hour for senior

attorneys. (Order of April 2, 1976, 68 Civ. 4026 CMM)

In arriving at such fees, the Court stated as follows:

> "These cases make it clear that 'the first legitimate starting point for analysis' is to multiply the number of hours spent by counsel by a reasonable hourly rate for the time spent." (p. 2)

After making this initial objective determination, the District Court reviewed the risk of litigation factor, and awarded thrice (p. 9) the basic "lodestar" rate, except with respect to settlement administration for which the multiple applied was twice the "lodestar" rate. With respect to compensation for preparing and supporting the fee application in the District Court, and in the Court of Appeals, the Court opined "that such compensation is adequate at the basic hourly rate." (p.8)

The fee application here requested a multiple of two times the "lodestar" rate, except with respect to the legal fee application and certain miscellaneous items, totalling 83.75 hours, for which the basic hourly rate is requested, without any multiple applied thereto.

In the public interest litigation of Serrano v. Priest, (Sup. Ct., L.A. Co. Calif., Docket No. C-938-254),

the plaintiff sought no monetary relief but rather a change in the method of funding public education. The Court awarded counsel fees in the amount of $800,000.00, in an Order dated August 4, 1975. A basic lodestar fee of $150.00 per hour for an attorney admitted only four years was awarded, on the theory that the services rendered were of the quality of a "senior attorney." A specific finding of fact was made, that as of 1975:

> "70. The prevailing rate for a senior attorney in the Los Angeles area for non-contingent class action litigation is $150.00 per hour."

In a securities class action, Gilman v. Mohawk Data Sciences Corp., Docket No. 71 Civ. 4742 (SDNY 1976), the Court awarded counsel fees in a basic amount of $200.00 per hour for the senior partner of plaintiff's counsel, and $150.00 per hour for other partners in said firm. To this basic quantum meruit compensation, a multiple of three was applied, for the purpose of determining the subjective risk of litigation factors.

In Acker v. Provident National Bank, 512 F. 2d 729 (3rd Cir. 1975), the Court held that it was illegal

to comound interest in connection with credit card finance charge computations. As the instant action, Acker involved a National Bank Act claim.

On remand, in Acker, (No. 72-2343, E.D.Pa. Sept. 1975), the Court awarded counsel fees of $200,000.00, although it denied class action certification pursuant to Rule 23(b)(3) and granted injunctive relief pursuant to Rule 23(b)(2) as against only one of the defendants. No monetary fund was created.

Here, on the other hand, significant economic benefits accured to the class members, not present in Acker, as follows:

(a) a fund of $25,200.00 was created;

(b) the method enjoined was of much greater benefit to the class than the discontinuance of a compounding practice, as can be seen by the calculations provided by the Bank. (A 113 - 115).

D. Incentive to Vigilance Against Wrongdoing

The federal courts have long recognized the absolute necessity of the class action remedy to redress the grievances of small claimants. Concomitantly, attorneys

fees awarded to encourage the commencement of such actions to prevent corporate wrongdoing have been generous. The basis for such generosity has been eloquently limned by Judge Gurfein, as follows:

> "Private Attorneys General have been encourage by the Courts to tilt the lance for justice by the awarding of generous fees." (Rosenfeld v. Black, 56 F.R.D. 604, 605 (SDNY 1972)

This doctrine of generosity to encourage corporate therapeutics, has been explicitly recognized by this Court, in the following manner:

> "At the heart of the doctrine favoring the award of counsel fees in securities cases, is a need to encourage the vigor of private Attorneys General to provide corporate therapy protecting the public investor who might otherwise be victimized." (Grace v. Ludwig, 484 F. 2d 1262, 1267 (2d Cir. 1973), cert. den., 40 L. Ed. 2d 110 (1974)

In Torres v. Sacks, 538 F. 2d 10 (2d Cir. 1976), a civil rights case, this Court has even more recently reiterated its view as to"the measure of allowable fees," notwithstanding the lack of any pecuniary benefit to class members. It was there emphasized that legal fees should "furnish full recompense for the value of services in successful litigation" so as to assure continued representation

to enforce statutory rights which have been violated. Rejected was the argument that there should be a reduction of fees "less than the going rate for similar services received by privately employed counsel for work of comparable expertise, extent and complexity," (p. 11) because a publicly financed legal services organization represented the class.

The doctrine followed in this Circuit follows the explicit pronouncements of the U.S. Supreme Court that vindication of rights of class members warrants counsel fees, even where no monetary fund has been established, in order to encourage private litigation on behalf of small claimants whose rights have been infringed. Mills v. Electric Auto-Lite, 396 U.S. 375, 396 (1970); Hall v. Cole, 412 U.S. 1 (1973).

This principle of full compensation was codified in the recently enacted Attorney's Fees Awards Act, (P.L. 94-559). This Congressional enactment, overruling in part, Alyeska Pipe Line, supra, authorizes the award of fees to successful civil rights litigants. The measure of fees, as set forth in Senate Rep. No. 94-1011, describing the intent of the legislation, states as follows:

> "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of

> equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be non-pecuniary in nature." (1976 U.S. Code. Cong. Rec. & Admin. News, p. 6343)

The public policy rationale for full compensation to counsel for small claimants is also recognized in the bible for class action practitioners, to wit, the Manual for Complex Litigation, (1 B Moore, Fed. Prac. Sec. 1.47), which states this policy as follows:

> "(3) the policy of the law in class actions, including antitrust actions, is to provide a motive to private counsel to represent consumers and to enforce the laws."

E. Chilling Effect on Constitutional Rights

It is unassailably clear that no counsel of competence would undertake a novel, complex litigation of the type herein on a contingent basis, with the likelihood of success dependent upon "making law," at the rate of $26.00 per hour awarded by the Court below. The disincentive for litigation on behalf of small claimants by such a niggardly fee can only result in a lack of access to the judicial forum by those with small individual claims.

As a constitutional imperative, access to the Courts must be given at a "meaningful time and in a meaningful manner."

> Armstrong v. Manzo,
> 380 U.S. 545, 552 (1965);
>
> Antineau, Modern Const. Law,
> (Secs. 7:13, 7:14)

The inability to obtain competent counsel to redress grievances would violate fundamental requisites of due process of law and equal protection of the laws, mandated by the Fifth Amendment to the U.S. Constitution.

Paradoxically, the fees of counsel for the Bank, an adjudicated wrongdoer, are paid from revenues derived from class members, on a totally secretive basis, whereas counsel for the successful class members, has his fee established in a "goldfish-bowl" atmosphere, on a niggardly basis, although the class members, pursuant to the settlement, do not bear this burden.

The effect of such paradox is to cast disrepute uponthe legal profession, as the principle would be established that the rich and powerful have full access to the courts and the unfettered monetary ability to retain legal counsel and experts without limitation as to cost. Consumers and

other small claimants, however, because of financial practicalities, would have severely limited judicial access.

This incongruity can only have a chilling effect on the exercise of the constitutionally protected right "to petition the Government for a redress of grievances." (1st Am., U.S. Const.) and deprive aggrieved persons of modest financial means, of their elemental rights of "due process" and "equal protection of the laws."

POINT II

IT WAS ERROR TO DENY DISCOVERY OF THE LEGAL FEES OF THE BANK AS THEY ARE SIGNIFICANTLY RELEVANT AND MATERIAL TO THE LEGAL FEE QUESTION AT ISSUE AND NOT EMBRACED BY THE ATTORNEY-CLIENT PRIVILEGE

With respect to the legal fee issue presented herein, the plaintiff had served upon the Bank a demand for answers to interrogatories and a notice to produce, pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure (A39-41). In response thereto, the Bank served answers to certain of the interrogatories and objected to providing answers, or documents, with respect to interrogatories 1, 2 and 4 (A69,71-74)

The Bank objected to providing such data on two bases, to wit, (i) information sought was not relevant, or reasonably calculated to lead to the discovery of admissible evidence; and (ii) the attorney-client privilege shielded such revelation.

The objected to interrogatories and documents related to the amount of legal fees paid by the Bank in the unsuccessful defense of this action, and the details of such legal reperesentation in terms of the time spent, hourly rate of compensation. The motion to compel discovery of this data (A 75-79) was denied by the Court below from the Bench, without any reasons being given therefor. A memorandum was thereupon endorsed on the motion papers denying the application with the following notation:

"Motion Denied.
So Ordered."
(A 116)

A. Relevant and Material Information

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This Rule

provides wide discretion to the trial court. (Weinstein's Evid., para. 401.01 and 401.08)

The scope of such discretion is, of course, even broader for discovery purposes, as herein, than for evidentiary purposes at a trial. Bailey v. Meisterbraun, 55 F.R.D. 211 (N.D. Ill. 1972)

The disclosure of such information is expressly provided for in the Manual for Complex Litigation, supra, in the following terms:

> "In an appropriate case the Court may also require disclosure of attorney's fees paid to counsel for defendants." (Sec. 1.47)

It is submitted that this action is "an appropriate case" for the compelling of such disclosure, as it would be of substantial benefit to the Court in making the "lodestar" fee pursuant to Grinnell, supra. The number of hours expended by counsel for the bank and the nature of the services rendered would be highly relevant to the evaluating of the schedule of legal services submitted by appellant's counsel.

Additionally, the Grinnell formula requires that the number of hours expended be multiplied "by the hourly

amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation." (p. 471) Since counsel for appellant only represents plaintiffs on a contingent basis in class action litigation, a "typically" relevant hourly rate of compensation on a non-contingent basis, could best be obtained by reviewing the legal fees paid to counsel for the Bank.

The test of relevancy obviously is an extremely broad one. It is submitted that the Court below improperly limited the scope of plaintiff's attempt at discovery, particularly where the information sought related to a crucial and expeditious guide to the court in its evaluation of the reasonableness of counsel fees for the appellant.

B. Attorney-Client Privilege Not Applicable

The ambits of the attorney-client privilege extend to "confidential communications" necessary for the rendition of a legal opinion or legal advice." Duplan Corp. v. Deering Milliken Corp., 397 F.S. 1146, 1161 (D.C.S.C. 1974). The nature and amount of legal fees are not confidential communications necessary for the rendition of a legal

opinion or advice. Accordingly, it has been uniformly held that such fee arrangements must be revealed.

Colton v. U.S.,
306 F. 2d 633 (2d Cir. 1962);

U.S. v. Pape,
144 F. 2d 778, 782 (2d Cir. 1944)
cert. den. 323, U.S. 752 (1944);

Garner v. Wolfenbarg,
430 F. 2d 1093 (5th Cir. 1970);
cert. den. 401 U.S. 974 (1974);

Behrens v. Hironimis,
170 F. 2d 627, 628 (4th Cir. 1948);

In Re Michaelson,
511 F. 2d 882, 891 (9th Cir. 1975);

Bailey v. Meisterbraun, Inc., supra,
at p. 214;

Valente v. Pepsico,
68 F.R.D. 361 (D.C. Del. 1975).

C. Basic Fairness

Elemental concepts of fairness, constitutional requirements of realistic access to the courts on an equal basis, and public policy to provide an inventive for litigation on behalf of small claimants, warrant disclosure of the requested information, as it would be a meaningful measuring rod for determining a reasonable fee for counsel for the appellant. (See Point I E, supra)

Conclusion

For all of the foregoing reasons, the appellant respectfully requests a ruling granting the following relief:

1. Reversing the orders appealed from, except to the extent the sum of $12,500.00 was awarded for counsel fees.

2. Remanding to the court below for further proceedings to establish a fee based on proper standards, arrived at in an appropriate manner and articulated in findings of fact and conclusions of law.

3. Compelling defendant to disclose the answers and produce the documents requested by Interrogatories 1, 2 and 4, within ten (10) days after the decision herein.

4. Directing the court below, on remand, to determine legal fees in the following manner:

(a) The "lodestar" or minimum quantum meruit fee shall be calculated by (i) ascertaininy the number of hours necessarily expended by counsel; and (ii) multiplying such time at an hourly rate typical for senior attorneys providing like services for defendants in class actions on a non-contingent basis.

(b) The "lodestar," minimum quantum meruit fee shall be adjusted by the "risk of litigation" factor and such other factors as set forth in Grinnell, supra.

5. Awarding an additional counsel fee for the prosecution of this appeal and the proceedings on remand, to be established on a quantum meruit basis, as set forth in para. 4(a) above.

6. Directing defendant to pay to counsel for appellant the sum of $12,500.00 awarded by the court below, within seven days after the ruling herein, with interest from December 15, 1976, the date upon which the defendant could no longer appeal from the decision below, in compliance with paragraph "7" of the stipulation of settlement. (A 48)

7. Such other and further relief as this Court may deem just and proper.

Dated: New York, New York
January 31, 1977.

Respectfully submitted,

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